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In the

Supreme Court of the United States

October Term, 1985

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, AND MICHAEL MCCABE,
Petitioners,

vs.

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this court should grant a writ of certiorari where, as here, the petition for certiorari is not timely filed pursuant to statute.

2. Whether this matter is of such signficance or importance on the merits to justify review by this court on certiorari.

3. Whether the courts of appeal are in conflict so as to justify review by this court on certiorari.

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Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is included in petitioner's appendix and is reported at 761 F.2d 509 (8th Cir. 1985). The original order denying rehearing is not reported, but is included in respondent's appendix. An amended order denying rehearing is dated August 16, 1985, and is contained in petitioner's appendix. The opinion of the District Court is not reported.

JURISDICTION

Respondent contends that the jurisdiction of this court to consider the petition for writ of certiorari has not been timely invoked. The judgment of the Court of Appeals was entered on May 14, 1985. A timely petition for rehearing was denied on August 9, 1985. On August 16, 1985, the Court of Appeals amended its denial of the petition for rehearing, adding language stating that three judges dissented from the denial. Petitioners invoked the jurisdiction of this Court under 28 U.S.C. §1254 (1)(1966). The orders of the appeals court regarding the petition for rehearing are reproduced in respondent's appendix at pages 1a and 2a.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment I, is cited and quoted by petitioners.

STATUTES INVOLVED

The Minnesota Ethics in Government Act, Minn. Stat. §10A.01 (1984) et seq., has been cited and quoted by Petitioners.

STATEMENT OF THE CASE

Respondents concur with the Statement of the Case submitted by petitioners.

FACTS

The facts described by petitioners are substantially correct. Petitioners, in some cases, however, have trivialized their political activities in the State of Minnesota.

With regard to the lobbying activities of petitioners, it is true that on three separate occasions in 1981, the NRA caused thousands of letters to be mailed to its members in Minnesota. An additional undated postcard was also mailed into the state. These letters identified state legislators and urged that such targeted

legislators be telephoned and written regarding pending public legislation. One such mass mailing advised of a committee hearing and urged attendance.

Each of the mass mailings, however, went on to urge that non-members be enlisted in the lobbying effort. The undated postcard, for example, instructed "[P]lease try to attend this hearing and bring your fellow hunters, shooters, and sportsmen with you." The August 24, 1981 mailing stated "[U]rge your friends and neighbors to also contact their elected officials letting them know their support of these three sportsmen's bills." The April 8, 1981 mailing stated that " . . . crucial that you call Senator Gerald Willett at (612)296-4147 today and urge that he vote yes to morning dove hunting. Urge at least five other sportsmen to call."

These mailings involved over 150,000 pieces of mail sent into the State of Minnesota at a cost exceeding $30,000 and, as noted above, while the letters were in fact addressed only to members of the NRA, three of the four mass mailings urged members to enlist others to persuade legislators to support specific pending legislation.

The electioneering activities of petitioners were also minimized in their recitation of the facts. It is true, as conceded by petitioners, that the National Rifle Association Political Victory Fund, a federal political action committee, contributed $4950 to the Minnesota Gun Owners' Political Victory Fund, a state political fund and federal political action committee. The evidence at trial of this matter established much more than that, however. The money was specifically

intended to fund opposition to the gubernatorial candidacy of Warren Spannaus. (T. 206-207). Neal Knox, treasurer of the NRAPVF and executive director of the NRA, had been personally aware of Spannaus' gun control positions for years, and regarded Spannaus as a "target" for the NRA. (T. 208-209). Knox knew the money would be used to defeat Spannaus. In fact, the money was under no circumstances to be used for federal campaigns to avoid duplication of direct contributions by petitioners. The MGOPVF placed the money in its general fund, which was in fact expended on the "Dump Spannaus" campaign and other state races. (T. 133-138).

Other electioneering efforts were identified at trial. In October, 1980 the NRA, through the its Institute for Legislative Action, mailed a political

preference chart to each NRA member which rated Minnesota state and federal candidates. On August 22, 1982, the NRA, through the NRA-ILA, caused approximately 54,000 letters to be mailed to NRA members in Minnesota urging that Warren Spannaus be defeated in the gubernatorial primary. This mailing included a two page letter, a "Dump Spannaus" bumper sticker, and a "Dump Spannaus" brochure. Cost of preparing and copying the letter, sorting the mail, and postage were borne by the NRA-ILA, while NRA-PVF paid for printing the bumper stickers and brochures. In September, 1982, a "Dump Spannaus" postcard was mailed to approximately 54,000 NRA members by the NRA-ILA. A total of over $55,000 was expended by the NRA, the NRA-PVF and the NRA-ILA in these efforts to influence Minnesota state elections.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN TIMELY FILED AND CONSEQUENTLY SHOULD NOT BE CONSIDERED.

The Court of Appeals issued its order affirming the District Court on May 14, 1895. Petitioner's application for rehearing was denied on August 9, 1985. On August 16, 1985, the Court of Appeals (without request from any party) issued an amended order which noted that three members of the Court dissented from the denial of the petition for rehearing. This petition for certiorari was apparently filed with the Supreme Court of the United States on November 14, 1986. It was received in respondent's counsel's office on November 17, 1985.

Petitioners were allowed by statute ninety days to file their petition for a writ of certiorari. 18 U.S.C. §2101

(c)(1984). According to Supreme Court Rule 20.4, the ninety days commences with the denial of a petition for rehearing:

> . . . if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing. Supreme Court Rule 20.4.

Consequently, unless this Court finds that the time for filing the petition for writ of certiorari is tolled during the period between the denial of the petition for rehearing in the Eighth Circuit and issuance of the amended order, this petition has been filed more than ninety days following denial of the petition for rehearing, and consequently, should not be considered.

Nothing in the rules or case law supports petitioner's contention that the petition for a writ has been timely filed.

The reason Supreme Court Rule 20 marks time from the denial for a rehearing is that the petition for rehearing operates to suspend the finality of the lower court's judgment pending the lower court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. United States v. Healy, 376 U.S.75 (1964).

Here, of course, once the Eighth Circuit denied the petition for rehearing on August 9, 1985, that court's adjudications were concluded. No further opportunity for modification of the rights of the parties existed. The subsequent, gratuitous action of the Eighth Circuit in noting that three of its members would have reheard the matter is wholly non-substantive. The matter was ripe for petition to this court after August 9, 1985, and the time for petitioning ought

to be measured from that day. See also Federal Trade Commission v. Colgate Palmolive Co. et al., 380 U.S. 374 (1965) (time for certiorari runs from first judgment where second judgment merely reiterates the first).

In other cases, this court has consistently resolved that the period for filing a petition for certiorari is not tolled by events of no import. In Federal Trade Commission v. Minneapolis Honeywell Regulator Company, 344 U.S. 206 (1952), Honeywell petitioned the Seventh Circuit to review and set aside a three part order of the Federal Trade Commission. The Commission sought enforcement of all three parts of its order by cross-petition. In Seventh Circuit proceedings, Honeywell attacked Part III of the FTC's cease and desist order, abandoning its attack on Parts I and II. Ultimately the Court of

Appeals entered its judgment, reversing Part III of the cease and desist order, while not addressing Parts I and II. After the period for filing a petition for rehearing had expired, the FTC filed a memorandum with the court requesting that formal judgment be entered enforcing Parts I and II of the Commission's cease and desist order. A second judgment was duly entered, acknowledging that Parts I and II of the Commission's cease and desist order were affirmed, and ordering enforcement of those parts of the order.

More than ninety days following the first judgment, but less than ninety days following the second judgment, the Commission filed a petition for certiorari. This court denied that petition as untimely, saying:

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an

> immaterial way does not toll the time within which review must be sought. Only when the lower court changes matter of substance, or resolves a genuine ambiguity, and a judgment previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Federal Trade Commission v. Minneapolis Honeywell Regulator Company, supra, id. at 211.

The court went on to find that it had no jurisdiction to consider the petition for certiorari, employing language equally applicable to the matter now before the court:

> It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower

> court after judgment was rendered which is of no import to the matters to be dealt with on review. Id. at 213.

Similarly, there can be little question that the action of the Eighth Circuit in issuing a revised order which did nothing more than note that three judges dissented from the order denying rehearing disturbed no legal rights by and between the parties and was of no import to the matters to be dealt with on review. Consequently, no reason exists to determine that the period for filing this petition for writ of certiorari was tolled following the Eighth Circuit's original denial of rehearing. Morse v. United States, 270 U.S. 151 (1926) (time runs from the day when the court denied a timely filed motion for new trial, and was not postponed by the subsequent presentation of a motion (likewise denied) for leave to file a

further motion for a new trial). See also Department of Banking v. Pink, 317 U.S. 264 (1942); Zimmern v. United States, 298 U.S. 167 (1936); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952); Rubber Co. v. Goodyear, 73 U.S. 153 (1868).

Petitioners filed their petition for writ of certiorari 97 days after the Court of Appeals denied their petition for rehearing. The petition for a writ was received in this office 100 days following that denial. Since the subsequent order of the Eighth Circuit affects nothing of substance whatsoever, this petition is late and confers no jurisdiction on this court to consider it whatsoever. The petition should be denied.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION.

Petitioners suggest that this court should grant certiorari to review the question whether the District Court had federal subject matter jurisdiction to adjudicate the case. Respondent submits that this argument is not sufficient grounds to warrant a grant of certiorari and review by this court.

Whether the District Court had jurisdiction to hear this case, while newly important to the petitioners, falls far short of the standards for granting the statutory writ of certiorari. That question involves no conflict between the courts of appeals, presents no important question of state or territorial law, raises nothing in the way of important

issues never addressed by this court, and certainly involves no gross departure from the accepted, usual course of judicial proceedings so as to invoke the jurisdiction of this court. Supreme Court Rule 17.1. To the contrary, even should this court grant certiorari to consider the question of the district court's federal jurisdiction, such an effort by the court would merely correct a technical error. Applicants to this court have, on countless occasions, been reminded that the Supreme Court does not exist to correct technical errors affecting only the private rights of parties or in vindicating individual rights. See, e.g., Idaho Department of Employment v. Smith, 434 U.S. 100 (1977) (Stevens dissent). As stated by Justices Stevens, Brennan and Marshall in Anderson v. Harless, 459 U.S. 4, 12 (1982);

> It is not appropriate for this court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance, for the correction in no way promotes the development of the law. As echoed by Justice Rehnquist, "In our zeal to provide 'equal justice under the law', we must never forget that this court is not a forum for the correction of errors." (footnote omitted) (quoting Boag v. Mac Dougall, 454 U.S. 364 (1982)).

Since, as here, the court's grant of certiorari can only expend this court's scarce judicial resources in the resolution of a private dispute rather than any matter of public importance,

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between circuit courts of appeal.

Lane & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

This is especially true where the injury to petitioners, if any, is entirely self-inflicted. This case was originally filed by respondent in the state courts of Minnesota. Petitioners removed the matter to federal district court and opposed respondent's motion to remand to the state courts for lack of federal subject matter jurisdiction. The reason this case even presents any question regarding the presence or absence of federal subject matter jurisdiction is petitioners' vigorous effort to ensure that the matter be heard by the federal courts. Now, however, having lost in the district court and in the court of appeal, petitioners request that the scarce resources of this court be expended in correcting an alleged private, technical injustice which has occurred, if at all, entirely due to the procedural machinations of petitioners.

Under these circumstances, the petition is especially weak and ought to be promptly denied.

Petitioners rely heavily on Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S.1 (1983) to bolster their contention that this court should grant the discretionary writ of certiorari. There, however, this court was obliged to consider the matter of subject matter jurisdiction since Franchise Tax Board came to the Supreme Court on appeal rather than certiorari. Here, the precise issue before the court is whether certiorari should be granted to review a procedural controversy which is of no general importance whatsoever and which arises only because of the NRA's successful efforts to remand this case to the federal courts. Obviously, if this matter came to this court on appeal as of

right, the issue would be reviewed substantively. In this posture, however, it is respectfully submitted that certiorari need not be granted to attend the NRA's self-inflicted wounds.

III. THE COURT OF APPEALS DECISION IS CONSISTENT WITH BUCKLEY v. VALEO, 519 F.2d 821 (D.C. Cir. 1975).

Petitioners contend that the Eighth Circuit's decision in the instant case conflicts with Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975). Allegedly, the Buckley court's holding that Section 473a of the Federal Election Campaign Act was unconstitutional conflicts with the Eighth Circuit's decision upholding the Minnesota Ethics in Government Act.

If anything, the D.C. Circuit decision supports the position of respondents. Both the Court of Appeals for the District

of Columbia and this court in Buckley v. Valeo, 424 U.S. 1 (1976) upheld those requirements of the federal act requiring the disclosure of PAC activities and the identity of contributors beyond a certain monetary threshold. In fact, the Minnesota act, modeled on the federal act, depends on this court's ruling in Buckley to support its constitutionality.

Section 437a of the federal act provides that:

> Any person, other than an individual, who expends any funds or commits any act directed to the public for the purpose of affecting the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate . . . advocating the election or defeat of such candidate . . . shall file reports with the Commission as if such person were a political committee. The reports filed by such person shall set forth the source of funds used in carrying out any activity . . . in the same detail as if the funds were contributions . . . 2 U.S.C. 437(a) (1985).

As interpreted by the D.C. Circuit,

> Dissecting the statutory language, it is seen that Section 473a's demand for disclosure is activated --without any "expending of any funds whatever" -- (i) by "any act directed to the public for the purpose of influencing the outcome of an election"; or (ii) by "any material" "published or broadcast to the public" which refers to a candidate (by name, description or other reference)" and which (a) "advocates the election or defeat of such candidate" or (b) "sets forth the candidate's position on any public issue, his voting record or other official acts (in the case of a candidate who holds or has held federal office) and ("or (c) is "otherwise designed to influence officials to cast their votes for or against such candidate or to withhold their votes from such candidate." Notwithstanding the exemption of such activities, . . . the scope of Section 437a is potentially expansive. Buckley v. Valeo, supra, id. at 870.

The constitutional flaw found in this section by the D. C. Circuit was its potential application to "groups whose only connection with the elective process arises from completely nonpartisan public

discussion of issues of public importance". Id. at 870. As noted by the court:

> We might add to the list of publications potentially affected by such comment, trade and professional journals, campus newspapers, union newsletters and even church bulletins, among a host of others. Indeed, every little Audubon society chapter [might be intercepted for 'environment' as an issue in one campaign or another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a golden age club promoting 'senior citizens' rights' might] "fall under the act". Id. at 871.

The appeals court had no trouble distinguishing such groups from those which constitutionally can be obliged to report and disclose their political activities.

> It is well established that compelled disclosure of the kind of information section 437a exacts can work a substantial infringement of the associational rights of those whose organizations take public stands on public issues. E.G. NAACP v. Alabama ex rel. Patterson, 357

> U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Bates v. Little Rock, 361 U.S. 516, 522-524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960). To say this is not to denigrate our action upholding the Act's disclosure requirements applicable to "political committees" and to "contributions" and "expenditures" as those terms are defined therein. We have sustained those provisions although compliance with them may impose a burden that is more than trivial, and may portend a deterrence that arouses some concern. Our holdings supporting the Act's central disclosure requirements are grounded on our recognition that the government has demonstrated a substantial and legitimate interest in protecting the integrity of its elections, an interest closely connected to and plainly advanced by those provisions.
>
> Section 437a, however, seeks to impose the same demands where the nexus may be far more tenuous. As we have said, it may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly non-partisan basis. Buckley v. Valeo, supra, id. at 872.

Based on the potential reach of Section 473a, the appeals court held it unconstitutionally vague and overbroad.

In so doing, the Court of Appeals refused to adopt a narrow construction of the statutory phrase "purpose of influencing the outcome of an election" to avoid affecting purely issue discussion groups.

This ruling in no way conflicts with the Eighth Circuit ruling on the Minnesota statutes. The Minnesota law requires reporting and registration by political funds which are defined as "any accumulation of dues or voluntary contributions . . . which is collected or expended for the purpose of influencing the nomination or election of a candidate." Minn. Stat. §10A.01 (16) (1984).

The Minnesota law, unlike Section 437a of the federal law, then, specifically requires the expenditure of funds for the specific purpose of influencing an election, thereby failing to reach the

public discussion groups which concerned the D. C. Court of Appeals. In fact, the Minnesota "political fund" reporting and disclosure requirements closely resemble the federal requirements for political committees which are expressly upheld against constitutional attack without serious question by both the D. C. Court of Appeals and this court.

Far from presenting a question involving a conflict among the Courts of Appeals, this case presents "issues" already ruled upon by this Court in the definitive case of Buckley v. Valeo. The reporting and disclosure requirements there, practically identical to those adopted by Minnesota, were found fully constitutional. Petitioners have made no claim of harassment or discrimination which concededly might be the basis for an exemption from the requirement, as noted

by this court in Buckley. Absent such a claim, the associational arguments raised by petitioners are neither controversial nor doubtful, and make no compelling case for a grant of a writ of certiorari. Indeed, for petitioners, which mounted determined and militant efforts to defeat a particular state candidate on the basis of single issue politics, to cite the D. C. Circuit's concern for the Audubon Society as a conflict among the circuits, demonstrates how meagre the grounds are for granting certiorari in this case. Unless the National Rifle Association intends to masquerade as a public interest discussion group with no particular political agenda, the court of appeals' Buckley decision is of no benefit to them, and adds nothing to this petition for certiorari.

CONCLUSION

The petition not having been timely filed, should not be considered by the Court. The ninety days provided for the petition is "more than ample . . . to determine whether to seek further review". Commissioner of Internal Revenue v. Estate of Bedford, et al., 325 U.S. 283, 288 (1945). And, this Court has made clear that petitions are not saved by the issuance of a second Eighth Circuit order denying rehearing given the complete lack of substance to that action.

Beyond the untimely filing of their petition, no adequate grounds exist for granting the petition. If the district court in fact lacked subject matter jurisdiction, that is a matter of no general importance and a problem which is entirely caused by petitioners themselves.

To grant this petition, then, this court must first excuse the failure of petitioner to timely approach this Court, and then conclude that the offices of the Supreme Court of the United States should be mustered to save the National Rifle Association from an eminently sensible and equitable judgment on the most technical of grounds where the technical flaw, if any, was an entirely self-inflicted wound. Under these circumstances, the petition should, it is respectfully submitted, be promptly denied.

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UNITED STATES COURT
OF APPEALS
For the Eighth Circuit

No. 84-5101-MN

Minnesota State Ethical Practices Board,	*	
Appellee,	*	
vs.	*	Appeal from the United States District Court for the District of Minnesota
The National Rifle Association of America, et al.,	*	
Appellants.	*	

Appellants' petition for rehearing en blanc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 9, 1985